

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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NASSER MORADI, et al.,

Plaintiffs,

v.

SHELDON GARY ADELSON, et al.,

Defendants.

Case No. 2:11-cv-00490-MMD-RJJ

ORDER

(Defs.' Motion to Dismiss or Stay Action Pending Resolution of State Proceeding and Investigation by Special Litigation Committee – dkt. no. 77)

I. SUMMARY

Before the Court is Defendants' Motion to Dismiss or Stay Action Pending Resolution of State Proceeding and Investigation by Special Litigation Committee ("Motion to Dismiss or Stay"). (Dkt. no. 77.) For reasons stated below, the Court grants Defendants' Motion to Stay Pending the Resolution of the Special Litigation Committee's Investigation. The Motion is denied without prejudice in all other respects.

II. BACKGROUND

Plaintiffs commenced three separate federal shareholder-derivative actions in April 2011. Shareholder Plaintiffs allege that the directors of the Las Vegas Sands ("LVS") Board of Directors breached their fiduciary duties in connection with LVS' operations in the Chinese special administrative region of Macau. (See dkt. no. 78.)

In February 2011, the Securities and Exchange Commission ("SEC") issued a subpoena to LVS requesting that it produce documents relating to its compliance with the Foreign Corrupt Practices Act ("FCPA"). LVS complied on March 1, 2011. This public disclosure led to the filing of a number of shareholder-derivative actions including

1 the consolidated action before this Court. LVS is also currently under investigation by
2 the SEC and the Department of Justice (“DOJ”) relating to its possible FCPA violations.

3 The alleged FCPA violations provide the basis for Plaintiffs’ lawsuit. Plaintiffs
4 allege that Defendants’ FCPA violations will have a significant negative impact on the
5 company, estimating the cost to be in “the hundreds of millions of dollars.” (Dkt. no. 78
6 at 9.) Plaintiffs explain that:

7 Non-compliance with the FCPA may result in fines, sanctions, and other
8 adverse actions, including exposing the Company to civil liability. Because
9 Sands operates in some countries that involve a higher than normal risk of
10 violations of the anti-corruption laws, including the FCPA, the Sands Board
11 had a fiduciary duty to install and maintain internal controls and [an]
12 accounting system for compliance with the FCPA.
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14 (Dkt. no. 78 at 4.)

15 In their Consolidated Complaint (dkt. no. 78), Plaintiffs allege (1) breach of
16 fiduciary duty; (2) abuse of control; (3) waste of corporate assets; and (4) conspiracy.
17 (*Id.* at 48-50.)

18 On August 25, 2011, the Court consolidated the three shareholder-derivative
19 lawsuits and directed Plaintiffs to file a consolidated amended complaint. (Dkt. nos. 52 &
20 75.) However, before Plaintiffs filed their Consolidated Complaint, Defendants filed a
21 Motion to Dismiss or Stay. Defendants argue that *Colorado River Conservation Dist. v.*
22 *United States*, 424 U.S. 800, 817 (1976), requires this Court to stay or dismiss the
23 federal action because of the existence of an earlier-filed nearly identical shareholder-
24 derivative action pending in state court. (Dkt. no. 77.) That case, *In re Las Vegas Sands*
25 *Derivative Litigation*, has been voluntarily stayed since October 5, 2011, and the most
recent stipulated stay is set to expire in October 2012. In the alternative, Defendants
request that the Court temporarily stay the action to allow LVS’ Special Litigation
Committee (“SLC”) to complete its investigations regarding Plaintiff’s allegations.

26 In response to the Court’s order for a joint status report on the progress of the
27 SLC’s investigation, Defendants submitted a declaration from counsel for the SLC,
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1 reporting that the SLC's inquiry is expected to be substantially completed by the end of
 2 October 2012. (Dkt. no. 111-1.)

3 **III. DISCUSSION**

4 Based on the representation relating to the progress of the SLC's investigation,
 5 the Court determines that the appropriate course of action is to stay this case until
 6 October 2012. The Court therefore declines to rule on Defendants' Motion to Dismiss or
 7 Permanently Stay the action at this time. That Motion is dismissed without prejudice.

8 **A. Legal Standard**

9 The landmark case *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)
 10 "permits a corporation to use a special litigation committee to restore control over
 11 derivative litigation if a group of independent directors is so empowered to act for the
 12 corporation."¹ *In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206, 1210 (Del. Ch. 2002).
 13 "When a special litigation committee is empowered to decide whether and in what
 14 manner a derivative suit should proceed, the *Zapata* procedure takes the case away
 15 from the [derivative] plaintiff, turns his allegations over to special agents appointed on
 16 behalf of the corporation for the purpose of making an informal, internal investigation of
 17 his charges, and places the plaintiff on the defensive [if a] motion to dismiss is filed by
 18 the special litigation committee." *Id.* at 1210-11 (citation and internal quotation marks
 19 omitted; brackets in original). See also *Kaplan v. Wyatt*, 484 A.2d 501, 510 (Del. Ch.
 20 1984) *aff'd*, 499 A.2d 1184 (Del. 1985) ("It is a foregone conclusion that [a motion to stay
 21 pending the resolution of an SLC investigation] must be granted. Otherwise, the entire
 22 rationale of *Zapata*, i.e., the inherent right of the board of directors to control and look to
 23 the well-being of the corporation in the first instance, collapses.")

24 In *Abbey v. Computer & Commc'n Tech. Corp.*, 457 A.2d 368, 375 (Del. Ch.
 25 1983), the court explained the importance of staying pending litigation when a
 26 corporation forms an SLC:

27 ¹Nevada courts follow Delaware law when addressing shareholder-derivative
 28 lawsuits. *In re Amerco Derivative Litig.*, 252 P.3d 681, 697 (Nev. 2011).

If *Zapata* is to be meaningful, then it would seem that such an independent committee, once appointed, should be afforded a reasonable time to carry out its function. It would likewise seem reasonable to hold normal discovery and other matters in abeyance during this interval. If a derivative plaintiff were to be permitted to depose corporate officers and directors and to demand the production of corporate documents, etc. at the same time that a duly authorized litigation committee was investigating whether or not it would be in the best interests of the corporation to permit the suit to go forward, the very justification for the creating of the litigation committee in the first place might well be subverted.

In light of these considerations, courts routinely grant reasonable stays to allow special litigation committees to complete their investigations. *In re InfoUSA, Inc. Shareholders Litig.*, No. CIV. A. 1956-CC, 2008 WL 762482, at *2 (Del. Ch. Mar. 17, 2008).

B. Analysis

Defendants argue that this case should be stayed under the principles discussed in *Abbey* to allow the LVS SLC to investigate the allegations raised in the shareholder Complaint. (Dkt. no. 77 at 16.) Defendants further contend that a “stay is particularly appropriate here given the complex, competing demands that this litigation has placed on the [B]oard and its SLC” (Dkt. no. 86 at 13.)

Plaintiffs counter that the case should not be stayed pending the resolution of the SLC investigation for three reasons. (Dkt. no. 82 at 15-21.) First, Plaintiffs argue that the LVS Board only delegated investigative authority to the SLC, whereas the case law supports staying an action until the conclusion of an SLC investigation *only* where the SLC is delegated authority to make the ultimate determination as to the course of action to be taken in response to shareholders’ allegations. (Dkt. no. 82 at 16.) Second, Plaintiffs argue that there is reason to doubt that the SLC is disinterested and independent of the LVS Board because three of the members of the SLC are defendants in this action. (Dkt. no. 82 at 17-20.) Third, Plaintiffs argue that the delay produced by temporarily staying this litigation will result in substantial prejudice to Plaintiffs. (Dkt. no. 82 at 20-21.)

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1 The Court agrees with Defendants and concludes that this case should be
2 temporarily stayed until the close of the SLC investigation. This case is particularly
3 complex given the multiple lawsuits filed against Defendants, the numerous federal and
4 state statutes for which Plaintiffs allege Defendants violated, and the many ongoing
5 investigations of LVS that are being conducted by federal and state authorities. The
6 LVS Board has provided the LVS SLC with the sole discretion to conduct an
7 independent investigation into these matters. In accordance with this directive, the SLC
8 has interviewed in excess of 200 individuals in both the United States and Macau. (Dkt.
9 no. 111-1 at 3.) It is also in the process of reviewing “millions of potentially relevant
10 documents,” some of which are in Chinese and Portuguese. (*Id.*) The SLC anticipates
11 being finished with its investigation in October of this year. This complex investigation
12 expends significant corporate resources which would be further strained by
13 simultaneously proceeding with this lawsuit. More importantly, the results of the
14 investigation will likely bring to light facts relevant to the litigation, and the SLC’s
15 recommendation regarding whether LVS should pursue the litigation may also have a
16 significant impact on this case. Because of the complexity of the investigation, the policy
17 favoring staying litigation until the conclusion of an SLC’s investigation, and the fact that
18 the SLC anticipates concluding its investigation in approximately two months, the Court
19 determines that a stay is appropriate in this case.

20 Plaintiffs’ arguments to the contrary are unavailing. Regarding their first
21 argument, it is true that “a mere advisory role of the Special Litigation Committee fails to
22 bestow sufficient legitimacy on [a board’s] decision to warrant deference . . .” in the
23 context of a board’s recommendation to dismiss a lawsuit. *In re Par Pharm., Inc.*
24 *Derivative Litig.*, 750 F. Supp. 641, 547 (S.D.N.Y. 1990). However, here the Court is
25 merely temporarily staying the lawsuit, not deciding on Defendants’ Motion to Dismiss.
26 Therefore the relative power of the SLC vis-à-vis the Board to make critical decisions
27 regarding the decision to proceed with a shareholder derivative action is of no significant
28 import here. Moreover, the SLC may recommend pursuing the litigation and the Board

1 may adopt its decision. It would thus be premature to demean the SLC's legitimacy
 2 before it finishes its investigation and makes its recommendations to the Board.

3 Plaintiffs' second argument – that there is reason to doubt the independence of
 4 the SLC – is also unconvincing. Plaintiffs cite to *Biondi v. Scrushy*, 820 A.2d 1148, 1165
 5 (Del. Ch. 2003) *aff'd sub nom. In re HealthSouth Corp. Shareholders Litig.*, 847 A.2d
 6 1121 (Del. 2004), for the proposition that a stay should not be granted when the
 7 undisputed facts in the record at the time of the stay motion demonstrate that the SLC
 8 does not satisfy the *Zapata* requirement for independence. (Dkt. no. 82 at 17). Yet the
 9 typical course of action is to attack the independence of the SLC *after* the committee has
 10 issued its report. See *Biondi*, 820 A.2d at 1164. "One of the obvious reasons for this
 11 normal practice is that in most cases a facial attack on the independence of the special
 12 litigation committee at the time of the stay application would be futile. After all, the
 13 purpose of forming a special litigation committee is to entrust the fate of the lawsuit to
 14 directors whose impartiality cannot reasonably be questioned." *Id.* Further, the
 15 undisputed facts in the record here do not demonstrate that the SLC's composition
 16 violates the *Zapata* independence requirement. LVS has retained independent counsel
 17 as required by Delaware law. See *in re Par Pharm.*, 750 F. Supp. at 647. Despite this,
 18 Plaintiffs contend that three members of the SLC Audit Committee – Siegler, Adler, and
 19 Schwartz – are named defendants in this action and were "hand selected" for the SLC
 20 by Sheldon Adelson, LVS' majority shareholder. (Dkt. no. 19 at 23.) While these
 21 allegations, if true, could taint the independence of the SLC, merely being named as
 22 defendants does not establish that Siegler, Adler, and Schwartz are not independent.
 23 And Plaintiffs do not plead with particularity their allegations regarding these defendants'
 24 lack of independence. See *In re First Bancorp Derivative Litig.*, 465 F. Supp. 2d 112,
 25 120 (D. P.R. 2006). This Court agrees with the *InfoUSA* court's reasoning that "judicial
 26 economy is served by permitting [the independence] issue to be addressed after the
 27 committee has issued its report, because the court may then consider questions of
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1 committee independence at the same time it examines the reasonableness of the bases
2 for the committee's conclusion." 2008 WL 762482, at *2 (brackets in original).

3 Finally, the Court rejects Plaintiffs' argument that temporarily staying this action
4 will unduly prejudice them. A "stay of action requires a balancing of the interest of the
5 plaintiff, the interests of the defendant, all with an eye to the efficient and fair
6 administration of justice." *Carleton Inc. v. TLC Beatrice Intern. Holdings, Inc.*, No.
7 13950, 1996 WL 33167168, at *8-9 (Del. Ch. June 6, 1996). As Defendants note, the
8 SLC needs time to gather information from its numerous witnesses and review the
9 voluminous documents it has gathered. (Dkt. no. 77 at 19.) Proceeding with this lawsuit
10 before the conclusion of the SLC's investigation could harm Plaintiffs if the SLC
11 recommends pursuing Plaintiffs' litigation. If it does not, Plaintiffs may challenge that
12 decision in this Court. Plaintiffs will endure minimal prejudice by staying this action until
13 October. The Court will revisit the stay at the end of October whether or not the SLC has
14 concluded its investigation.

15 For these reasons, Defendants' Motion to Stay this action pending the resolution
16 of the SLC's investigation is granted. The Motion is denied without prejudice in all other
17 respects.

18 **IV. CONCLUSION**

19 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss or Stay Action
20 Pending Resolution of State Proceeding and Investigation by Special Litigation
21 Committee (dkt. no. 77) is GRANTED in part and DENIED in Part. The Court GRANTS
22 Defendants' Motion to Temporarily Stay the Action. The Court DENIES Defendants'
23 Motion to Dismiss or Permanently Stay without prejudice.

24 IT IS FURTHER ORDERED that the Clerk of the Court must stay this action until
25 October 30, 2012.

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1 IT IS FURTHER ORDERED that the parties file a joint status report with the Court
2 on or before October 30, 2012, describing what progress the Las Vegas Sands SLC has
3 made in its investigation and the status of this case in general.

4 DATED THIS 27th day of August 2012.

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7 UNITED STATES DISTRICT JUDGE

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